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No. 85-1252

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ARKLA ENERGY RESOURCES,
a division of Arkla, Inc.
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER ARKLA ENERGY RESOURCES

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STATUTES

Natural Gas Act:

Section 5, 15 U.S.C. § 717d (1982)..... *passim*

Section 7, 15 U.S.C. § 717f (1982) ..... *passim*

structure of the NGA and that, if accepted, would destroy the reliability of certificates on which billions of dollars of investment have been predicated.

The Commission's legal argument is confined to the assertion of its undisputed power "to utilize its Section 5 rate regulating authority to alter the rates contained in [a] certificate." Comm'n Br. at 17.[1] At most, the Commission's authority to alter rates provides support for that portion of its orders addressing minimum bill provisions. Minimum bills require the payment of funds and could arguably affect the per unit rate paid for gas taken by a pipeline's customer.

The Commission plainly overreaches, however, in asserting that its NGA Section 5 rate-setting authority empowers it to eliminate minimum take obligations. Comm'n Br. at 17 n.11. In fact, in another part of its brief, the Commission properly describes a minimum take obligation as a non-rate term:

> under which the customer is required to take physical delivery of a minimum quantity of gas and does not have the option of paying for gas not taken.

Comm'n Br. at 6 n.3. The obligation of the purchaser to take a specified quantity obviously has nothing to do with the seller's rates or rate structure. Unlike a minimum bill provision, a minimum take obligation can never require a purchaser to pay more per unit for gas it has taken than the just and reasonable rate established by the Commission. Rather than being rate-related, minimum take requirements constitute an essential aspect of the pipeline's service obligation. *See* Arkla Pet. at 3 nn.3-4 and accompanying text.

The Natural Gas Act draws a clear line between the authority to establish just and reasonable rates—NGA Sections 4 and 5—and

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[1] With one exception, all of the cases on which the Commission relies for its legal position involve changes in rates or billing mechanisms. Comm'n Br. at 17. The exception is the decision in FPC v. Louisiana Power & Light Co., 406 U.S. 621 (1972), which Arkla has shown is inapposite here. Arkla Pet. at 12.

the power to authorize service consistent with the public convenience and necessity—NGA Section 7.[2] Core features of service, such as quantity provisions, can only be altered if the procedures and standards of NGA Section 7 are observed. *See Reynolds Metals Co. v. FPC*, 534 F.2d 379 (D.C. Cir. 1976); *Panhandle Eastern Pipe Line Co.*, 24 FERC ¶ 61,337, at 61,715-16 (1983), *rev'd on other grounds, Northern Natural Gas Co. v. FERC*, 785 F.2d 338 (D.C. Cir. 1986).

The Commission does not contest the proposition that in order to accomplish fundamental changes in certificated service, a pipeline or other interested person must proceed under the certificate or abandonment provisions of NGA Section 7. The Commission claims, however, that it alone is not so constrained. The Commission's attempt to draw within its NGA Section 5 rate-setting authority the power to alter certificated quantity provisions is inconsistent with the statutory framework. Indeed, if the Commission's interpretation of the NGA were accepted, the Commission would be empowered to alter any provision of certificated service no matter how central that provision is to the service. The Commission has itself stated that even if it has such authority—a proposition about which it expressed substantial doubt—it could not alter certificated service except under very limited conditions not present here. *Trunkline LNG Co.*, 22 FERC ¶ 61,245, at 61,442 (1983).

In its orders, the Commission declined to discuss the relationship between its eradication of minimum take obligations and its admittedly limited, and perhaps non-existent, authority to alter certificates. The court below likewise failed to address this question, erroneously accepting the Commission's assertion that the issue involved only a matter of rates. The legal question presented by Arkla—one which affects the sanctity of certificates on which the

[2] The distinction between NGA Sections 5 and 7 is both procedural, Arkla Pet. at 11 n.12, and substantive. For example, application of the substantive criteria of NGA Section 7 would compel the Commission, before altering a minimum take obligation, to undertake a broad comparison of the interests of Arkla, its customer with a minimum take obligation, and the stockholders and consumers of both companies. *See* Transcontinental Gas Pipe Line Corp. v. FPC, 488 F.2d 1325, 1328-30 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 917 (1974). As evidenced by the orders at issue here, the Commission does not engage in such a comparative analysis under NGA Section 5.

entire interstate natural gas pipeline industry is based—should be fully and fairly addressed.

Accordingly, this court should issue a writ of certiorari to review the judgment of the court below.

Respectfully submitted,

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